No. 15471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF FOR UNITED STATES OF AMERICA.

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Assignment of Error in Reply to Appellee's Brief.

The action of the trial court in dismissing the indictment cannot be sustained on the ground that the statute under which the charge was brought is unconstitutional.

ARGUMENT.

The Statute Upon Which the Indictment Is Based Adequately Defines Those Who Come Within Its Proscriptions and Clearly Describes the Conduct Forbidden; the Statute Therefore Is Not Violative of the Fifth or Sixth Amendments to the Constitution of the United States.

Succintly stated, the argument advanced by appellee is that when Sections 78 and 91 of the Meat Inspection Act (21 U. S. C., Secs. 71 to 94) are read together they, in effect, provide that the transportation in interstate commerce of meat or meat food products which have not been marked as inspected and passed is forbidden, except by those "chiefly engaged in selling meat or meat food products to consumers only" and that the exception is so vague and indefinite that it is impossible for appellee to tell whether it comes within the exception. This interpretation of the statute is obviously erroneous for the reasons set out hereafter and for those advanced by appellant in its opening brief. It is submitted, however, that even if appellee were correct in its interpretation of the statute, the legislation would not be defective for failing to apprise adequately those who might come within the terms of the act that the proscriptions therein were applicable to them.

The law is clear as to the standard of definiteness required of penal legislation.

> "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."
>
> *Jordan v. DeGeorge,* 341 U. S. 223, 231-232 (1951).

The difficulty has arisen from applying this standard to specific statutory provisions. The inherent problem is that language which is descriptive of human conduct does not always lend itself to exactness. The problem is compounded by the fact that legislative bodies are faced with the problem of prescribing rules of conduct in wide areas —not simply in limited spheres of activity—and these rules, of necessity, must be prospective. This difficulty has been noted by the Supreme Court of the United States:

> "But few words possess a precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of the government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded."
>
> *Boyce Motor Lines v. United States,* 342 U. S. 337, 340 (1952).

Certainly, the phrase "chiefly engaged in selling meat or meat food products to consumers only" does not fall below the standard of definiteness required of legislation in a field such as the interstate transportation of meat. This is clear from an examination of but a few of the decisions of the Supreme Court of the United States which have upheld statutes which contained language no more definite.

United States v. Alford, 274 U. S. 264 (1927), holding that a provision of the Penal Code of March 4, 1909, which prohibited building a fire "near" any forest, timber, etc., was not too indefinite.

Omaechevarria v. Idaho, 246 U. S. 343 (1918), upholding a statute which prohibited sheep owners from

grazing on any range "usually occupied by any cattle grower."

Boyce Motor Lines v. United States, supra, upholding a regulation under 18 U. S. C. 835 requiring transporters of explosives to "avoid, so far as practicable . . . driving through congested thoroughfares."

Nash v. United States, 229 U. S. 373 (1913), holding that decisions which interpreted the Sherman Act as applying only to acts or combinations which "unduly" restrict competition or trade did not render the legislation void for indefiniteness.

Jordan v. DeGeorge, supra, holding that the phrase "any crime involving moral turpitude" in Section 19a of the Immigration Act of 1917 which required the deportation of an alien twice convicted of such an offense was not so indefinite as to make the section violative of the Constitution.

United States v. Petrillo, 332 U. S. 1 (1947), holding that Section 506(a)(1) of the Communications Act which prohibited coercing a radio broadcasting licensee to employ persons "in excess of the number of employees needed by such licensee to perform actual services" was not so vague and indefinite as not to provide an adequate standard.

It should be noted that a similar phrase to that with which we are here concerned was found capable of application to a given fact situation in *Evans v. Florida National Bank et al.,* 38 F. 2d 627 (5th Cir., 1930), which was concerned with Section 4(b) of the Bankruptcy Act (11 U. S. C. A., Sec. 22(b)) providing that a "person engaged chiefly in farming" was not subject to involuntary bankruptcy. Turning back to the field of penal legislation the Court of Appeals for the Tenth Circuit in

Martin et al. v. United States, 100 F. 2d 490 (10th Cir., 1938), cert. den. 306 U. S. 649, upheld the Motor Carrier Act of 1935 against a complaint that the act was unconsituation because of vagueness and uncertainty predicated on a provision that the act did not apply to "a person not engaged in such transportation as a regular occupation or business."

It is significant that the Meat Inspection Act which appellee attacks has been in effect more than fifty years and the specific language upon which the attack is focused has been in effect some nineteen years, yet both parties find themselves reasoning by analogy because no reported case has even considered the problem which appellee now attempts to raise.

> "But it has been suggested that the phrase 'crime involving moral turpitude' lacks sufficient definite standards to justify the deportation proceeding and that the statute before us is therefore unconstitutional for vagueness . . .
>
> "It is significant that the phrase has been part of the immigration laws for more than sixty years . . . No case has been decided holding the phrase vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process."
>
> *Jordan v. DeGeorge, supra,* pp. 229-230.

Even if we interpret the statute in the manner urged by appellee, the conclusion simply cannot be supported that Safeway Stores, appellee herein, was not adequately apprised that it did not qualify as an entity "chiefly engaged in selling meat or meat food products to consumers only." Perhaps some hypothetical situation might be posited wherein it would be difficult to apply the phrase with

which we are concerned. This, however, should not be the test in the instant case.

> "We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness."
>
> *Jordan v. DeGeorge, supra,* p. 231.

It is clear, beyond peradventure, that appellee herein could not have been misled by the language under consideration.

The foregoing discussion used as its point of departure the interpretation of Section 91 of Title 21, U. S. C. A. urged by appellant. The definitive answer to the claim that the Meat Inspection Act is unconstitutional is found by examining the language of the statute. Section 78 of the act prohibits *all persons* from transporting in interstate commerce meat or meat food products which have not been marked as inspected and passed in accordance with the terms of Sections 71 to 94 of the act. Section 91 of the act does not, however, provide a blanket exception for persons who fall within the definition of "retail dealer" therein. Subsection (c) of Section 91 merely gives to the Secretary of Agriculture authority to permit, at his discretion, persons who come within the meaning of "retail dealer" to transport in interstate commerce limited quantities of carcasses and fresh meat to consumers and meat retailers and to transport in interstate commerce to consumers only unlimited quantities of meat food products which have not been inspected and marked as inspected and passed in accordance with the terms of Sections 71 to 91 of the act. Succinctly stated, Sections 78 and 91 of the act when read together merely provide that no meat may be transported in interstate commerce

which has not been marked as inspected and passed—however, the Secretary of Agriculture may permit a "retail dealer" to transport such unmarked meat.

The phrase of which appellee complains therefore is not a provision which it must examine and interpret correctly at the peril of possible penal sanctions, but is simply a delegation of authority to the Secretary of Agriculture. Indeed, much broader powers than those with which we are here concerned have been delegated to the Secretary of Agriculture and sustained. *Currin v. Wallace,* 306 U. S. 1, 16 (1939). The rationale for this type of provision is obvious from an examination of the legislative history set out in appellant's opening brief wherein it is indicated that the purpose of the act was to protect the consuming public. However, an exception was provided in the case of small dealers who were in effect "peddling" across state lines. (App. Op. Br. p. 18.) Providing an exception only in cases where the Secretary has exercised his discretion obviously permits effective control of those falling within the exception as the permission of the Secretary could be revoked at any time. The proviso reflects a balancing of interests by attempting to protect the consuming public from adulterated meat through a tight check on interstate transportation without destroying the small dealer. An examination of the detailed inspection requirements in Sections 71 to 77 of the act points up the dilemma which would arise if the proviso had not been included. Even a small dealer would have to comply with these detailed inspection requirements or else his activities would be limited to those intrastate. Furthermore, the burden on the government of providing inspectors at each place where cattle were slaughtered, rendered, or packaged even though such operation were small, would be monumental.

The appellee suggests that the interpretation presently urged by the government would be unconstitutional. (Appellee's Br. p. 11.) The lack of merit in this allegation is apparent. Differences in treatment are often required in the area of economic regulations.

> *Secretary of Agriculture v. Central Roig Co. et al.*, 338 U. S. 604 (1950);
>
> *Wickard v. Filburn*, 317 U. S. 111 (1942).

Furthermore, it should be noted that the equal protection doctrine is not applicable to the Commerce Clause and any discrimination would have to qualify as injurious and violative of the Fifth Amendment to the Constitution before it could be made the subject of a complaint. *Currin v. Wallace, supra.* In any event, for reasons heretofore stated, it is obvious that the proviso in Section 91 has a firm basis.

One final word should be said about the interpretation of Section 91 for which appellee has pressed. The last paragraph of that section provides as follows:

> "The provisions of Sections 71-91 of this Title, requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers."

Appellee, in effect, argues that it is this provision which exempts any "retail dealer" from the act. The argument ignores the fact that two subjects are dealt with in Sections 71 to 94 of Title 21, U. S. C. One subject is the transportation of meat, and the other subject is the inspection thereof. Obviously the provision quoted above applies only to inspection. The reason for excluding all

retail dealers from the inspection requirements of the act is apparent. If the Secretary of Agriculture exercised his discretion as provided for in the first paragraph of (c) of Section 91 and permitted a retail dealer to transport unmarked meat in interstate commerce, such meat would, nevertheless, be transported in interstate commerce and, hence, the requirements for inspection at the establishments preparing the meat or meat food products for interstate commerce set out in Sections 71 to 77 of the act would have to be met. It is patently clear that the purpose of the proviso discussed above would have been completely thwarted if this were true. Therefore, it is logical that all inspection requirements are dispensed with so far as retail dealers are concerned. A close control, however, on transportation in interstate commerce of meat prepared without the rigorous inspection requirements is maintained.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court granting Appellee's Motion to Dismiss cannot be sustained on the ground that the Meat Inspection Act is unconstitutional.

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